

Carol:

Thanks so much for your input and guidance on the implementation of the PA for the DM&E Project. It establishes that we are on the right track for getting the tribes involved despite some resistance from DM&E and advice presented by HDR. It is sometimes hard to know that you are making the right suggestions when faced with so much resistance.

As you know, I sent an email to DM&E on Monday regarding my concerns about the continuance of field work since tribes were unaware of the work until I told them at the tribal summit. They were not pleased. I thus requested that DM&E suspend all field work until tribes have a chance to assess their needs and at least have a written outline of field work that DM&E has planned, including a schedule.

Since I spoke to you, It appears that DM&E has finally agreed on the need to get tribes out to some of the project areas ASAP. DM&E is now planning to schedule a meeting with tribes at Mankato (where Indian villages are known to exist and where additional below ground testing is planned). The Mankato area is of particular concern to me because of its clear linkage to the area tribes, especially the Sioux Nation. The tribes will have a chance to ride on the track itself and examine the Mankato site area.

I really appreciate you clarifying the language in the PA and ID Plan. I have heard over and over again from DM&E and HDR that tribes need not be in the field and that the only tribes that need to be consulted with and/or involved in the PA process are those that signed the PA. I have disagreed with this from day one and your input has established that, although there is some gray area, tribal involvement at this stage of the game must take place as part of the consultation process in identification, NR eligibility determinations, and the development of treatment plans. Pending your approval, I will point to your email as guidance regarding the specifications of the PA in the case similar questions/disagreements come up in the future. I need not send them a copy of the email, but if you are okay with this, I will tell them about the outcome of our discussion.

To answer your question regarding previous consultations: although tribal consultation occurred prior to 2003, there are many new faces that have no connection to what was decided in the PA. They are angry about this point, but I have suggested that we focus on how we can include them from here on. It is unfortunate that there was a delay of three years, but this was due to a legal remand and no one is at fault. Final approval of the project was provided by STB in May 2006.

I'll give you a call sometime today. I was out of the office yesterday and part of Tuesday.

Thanks again for your help on this (I promise not to tell MaryAnn:)

-Cathy

Catherine Glidden
Environmental Protection Specialist
Surface Transportation Board
Section of Environmental Analysis
Washington, DC 20423-0001
Phone: (202) 245-0293
Fax: (202) 245-0454

"Carol
Legal
rd"
<clegard@achp.gov>
To "Catherine Glidden" <gliddenc@stb.dot.gov>
cc "Blythe Semmer" <bsemmer@achp.gov>, "Charlene Vaughn"
<cvaughn@achp.gov>
Subject Tribal Consultation on the DM&E RR
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Cathy,

To follow up on our telephone conversation yesterday, I wanted to provide you with some additional thoughts on the requirement for tribal consultation under the Programmatic Agreement for the Powder River RR Project (DM&E).

The 2003 PA specifically requires that Tribal Historic Preservation Officers (THPOs) and cultural resource representative(s) designated by the tribe(s) be consulted regarding:

- the "portions to be surveyed on the existing rail line and new construction" (Stipulation A)
- identification of known cultural resources (Attachment A, No. 3.4.1)
- the evaluation of sites for NRHP eligibility (Attachment A, 3.4.4)

Stipulation A.1 of the PA states clearly that the signatories and invited signatories to the Agreement consent that historic properties will be identified in accordance with the Identification Plan (which is included as Attachment A). So, although not all tribes signed the PA, the signatories agreed that identification of all historic properties will follow the Identification Plan.

Attachment A clearly states that the term "historic property" includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that meet the National Register criteria, and that the plan itself addresses American Indian and consulting party involvement. The plan further requires intensive survey of the construction ROW to identify all cultural resources; and that testing be done to evaluate cultural resources against NRHP eligibility criteria. Of particular relevance: "The guidance in NPS Bulletin 38 and E.O. 13007 shall also be considered when evaluating sites for NRHP eligibility", tribes are to be consulted in applying the criteria for evaluation, and that for any cultural resource recommended as a "historic property" sufficient information to formulate Treatment Plan(s) shall be obtained. (Section 3.4.4).

It is my understanding that there has been previous consultation with Indian tribes, during development of the Programmatic Agreement, and that STB held

consultation meetings with some of the tribes and a tribal consultation summit earlier this month. The question, as I understand it, is whether the consultation thus far is sufficient for purposes of Section 106 and implementation of the PA. If a tribe, or tribes request an opportunity for an on site visit, or a chance to conduct their own survey for properties of traditional cultural and religious significance, should STB require the applicant to accommodate this request?

Since I'm not fully aware of what consultation has occurred before, nor what tribes have specifically requested, I cannot answer the question at this point. But some things you should consider in deciding how to proceed include:

- The guidance in Bulletin 38 (which the PA says STB will consider) talks about identifying traditional cultural properties and establishing a level of effort. While it is not always necessary for a Federal agency to conduct a field survey for traditional cultural properties, Bulletin 38 says that most TCPs are not well known to the traditional residents of an area and therefore must be identified through systematic study, just as most other kinds of historic properties. If it is the type of project that could affect TCPs if they are present, an identification effort to locate those properties would be appropriate. Further, Bulletin 38 says that "it is usually important to take knowledgeable consultants into the field to inspect properties that they identify as significant (p.7).
- It is common practice in many regions of the country (perhaps all) for Federal agency officials to take Indian tribal representatives on a tour of archaeological properties that were identified by archaeological consultants. This is to facilitate consultation with tribes about the effects of the undertaking on those properties and to seek information based on traditional knowledge that they may wish to share. Just last week, I attended an onsite consultation meeting with tribes in southern California - regarding a FHWA project -- to discuss the applicant's proposed archaeological testing plan. It was a very productive meeting and the tribal representatives appreciated an opportunity to see the sites and have input on the testing plan.
- Field work to identify non-archaeological TCPs may also be needed, although in my experience it is less frequent than visiting previously known sites and archaeological sites identified during the project archaeological survey.
- It may be necessary for a federal agency to visit a project area with Indian tribes when the tribes believe a historic property of traditional cultural significance may be located in the APE. In these cases, there should be a reasonable expectation that a HISTORIC property or properties may be present in the APE, based on information from knowledgeable individuals; oral history; or ethnohistoric information indicating that a specific geographic location within the APE meets the NR criteria and the definition of a TCP in Bulletin 38.

- E.O. 13007 (which is also cited in the ID Plan) requires Federal agencies to consult with Indian tribes about a projects effects to Native American sacred sites whether or not they are historic.

Finally, depending on the nature of the tribes' request, and the scope of the field work DM&E is hoping to get on with, it may be possible to allow DM&E to proceed with eligibility testing while consultation continues with Indian tribes. Stipulation A.3.1 of the PA requires that STB provide reports on surveys to all the consulting parties for a concurrent review. The PA and ID Plan include fairly strict provisions for providing consulting parties, including THPOs and tribes an opportunity to comment on survey reports, eligibility, and SHPOs must be consulted and approve of any backhoe or block excavations prior to their being conducted. It does not; however, seem to provide for review of a testing plan prior to conducting archaeological testing for NR eligibility.

I suggest that if not already in writing, you document the recommendations of the Indian tribes based on your meetings with them, and consider the above guidance, seek input from the appropriate SHPOs, and determine what further course of action is needed based on STB's understanding of the requirements of the PA. I'm happy to work with you on this, but would need to get up to speed on what work has been completed by DM&E and what is being proposed to offer much additional advice on this matter.

Hope this helps, Carol

*Carol Legard
FHWA Liaison
Advisory Council on Historic Preservation
202-606-8522
clegard@achp.gov*